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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1956~~ 7

No. ~~6~~ 54

FRANCISCO MENDOZA-MARTINEZ, *Petitioner*

v.

ARGYLE F. MACKEY, Commissioner of Immigration and Naturalization and HERBERT BROWNELL, JR., Attorney General of the United States, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No.

FRANCISCO MENDOZA-MARTINEZ, *Petitioner*

v.

ARGYLE F. MACKEY, Commissioner of Immigration and Naturalization and HERBERT BROWNELL, JR., Attorney General of the United States, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Francisco Mendoza-Martinez, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming a judgment of the United States District Court for the Southern District of California.

OPINION BELOW

The memorandum opinion and order of the trial court is set forth in the Transcript of Record printed for the use of the Court below (R. 18-24). The per curiam opinion of the court below (R-42) is not yet reported. It is set forth hereinafter as Appendix "A". The judgment of the court below (R-44) is set forth hereinafter as Appendix "B".

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

1. The date of the judgment sought to be reviewed is November 2, 1956 and the time of its entry is the same.

2. No rehearing was requested nor was any extension of time within which to petition for certiorari requested.

3. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Is Section 401(j) of Immigration and Nationality Act of 1940 (as amended in 1944), 8 U.S.C. (1946 ed.) § 801(j), unconstitutional for the reason that Congress has no express or implied power to take from a native of the United States without his consent the right of citizenship vested in him by the Fourteenth Amendment to the Constitution?

2. If expatriation can only be voluntary, but if said Section 401(j) is regarded as merely a Congressional definition of the means by which the voluntary choice shall be made known, is Section 401(j) then violative of the due process clause of the Fifth Amendment for the reason that the section is an improper conclusive presumption?

3. When a native of the United States is ordered deported on the basis of his involuntary expatriation under said Section 401(j), is there not actually imposed on him the primitive criminal sanction of banishment, and is said Section 401(j) therefore not violative of the cruel and unusual punishment provision contained in the Eighth Amendment to the Constitution?

4. In similar fashion, if said Section 401(j) provides in reality for the imposition of a criminal sanction, is it violative of the protections afforded in criminal cases under the Fifth and Sixth Amendments of the Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

1. Section 401(j) of the Nationality Act of 1940, 54 Stat. 1168, 58 Stat. 746, 8 U.S.C. (1946 ed.) § 801(j):

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> "(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

2. Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . ."

3. Fifth Amendment to the United States Constitution:

> ARTICLE [V.]
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. Sixth Amendment to the United States Constitution:

ARTICLE [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witneses in his favor, and to have the assistance of counsel for his defence.

5. Eighth Amendment to the United States Constitution:

ARTICLE [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Petitioner was born in Bealville, Kern County, California, on March 3, 1922 (R-4, 9, 26). In 1942 he departed the United States for Mexico and remained there until 1946 (R-26). Upon his return he was indicted in the District Court of the United States, Southern District of California, for evading military

service by departing the United States. The indictment was filed June 11, 1947, and petitioner entered a plea of guilty. Judgment was entered against him on June 23, 1947.

He was committed on August 5, 1947, to a Federal penitentiary and thereafter served a period of one year in prison. (R-7).

Following his release, he returned to Mexico for a brief visit in 1953 and was thereafter arrested as an excludable alien under the provisions of Sec. 241-a-1 of the Immigration and Nationality Act. (R-10, 11, 25).

After a hearing before a hearing officer of the Immigration and Naturalization Service, Petitioner was ordered deported per an order of that Service dated September 11, 1953. (R-5-11). Petitioner exhausted his administrative remedies by unsuccessfully appealing to the Board of Immigration Appeals (R-12-13).

Thereupon Petitioner filed the present action in the District Court of the United States, Southern District, seeking a declaration under 8 U.S.C. 1503 that he was an American citizen and hence not subject to deportation (R-3-11). At trial, the sole issue raised by Petitioner was his contention that Section 401(j) of the Nationality Act of 1940, as amended in 1944, is unconstitutional. (R-20-23).

The relief sought was denied, judgment against Petitioner having been entered on September 23, 1955. (R-29-31).

Notice of appeal to the United States Circuit Court for the Ninth Circuit was filed October 21, 1955 (R-31). Thereafter a per curiam decision was rendered in said

Circuit Court of Appeals affirming the judgment below (R-42-43) and judgment was entered to the same effect on November 5, 1955 (R-44). No petition for rehearing was filed.

To review this judgment, Petitioner now seeks a Writ of Certiorari. Here, as below, Petitioner's sole contention is that Section 401(j) of the Nationality Act of 1940, as amended in 1944, is unconstitutional.

REASONS FOR ALLOWING THE WRIT

Certiorari has already been granted by this Court in a case involving closely parallel facts and raising precisely the same constitutional issue: *Perez* v. *Brownell*, United States Supreme Court No. 318 Misc., 235 F. (2d) 364. There, as here, the sole issue raised is the constitutionality of Section 401(j) of the Nationality Act of 1940, as amended in 1944. A writ has also been granted in a case involving a companion subsection (401(c)), *Nishikawa* v. *Dulles*, United States Supreme Court No. 415, and petitioner assumes that they will be argued together or contiguously. It is respectfully urged that Petitioner is equally entitled to a writ, since his grounds are precisely identical with those in the *Perez* case and identical in part with those in the *Nishikawa* case. It is further respectfully urged that it would be in the interest of justice to set the present case for argument at the same time as or following the aforesaid two other cases.

Respectfully submitted,

JOHN W. WILLIS
VINCENT P. DIGIORGIO
THOMAS R. DAVIS
Attorneys for Petitioner

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,997

Nov. 2, 1956

FRANCISCO MENDOZA-MARTINEZ, *Appellant*,

v.

ARGYLE R. MACKEY, Commissioner of Immigration and Naturalization and HERBERT BROWNELL, Attorney General of the United States, *Appellees*.

Appeal from the United States District Court for the Southern District of California, Northern Division.

Before: BONE, ORR, and HAMLEY, Circuit Judges

PER CURIAM:

Mendoza-Martinez appeals from an adverse judgment in an action for declaratory judgment in the United States District Court for the Southern District of California, Northern Division.

Appellant departed the United States in 1942 for Mexico and remained there until 1946. Upon his return to the United States, he was convicted for draft evasion under 50 U.S.C.A. App. Sec. 311. While in custody, appellant was arrested by the Immigration and Naturalization Service for illegal entry; the warrant alleged expatriation under Sec. 401(j) of the Nationality Act of 1940, 54 Stat. 1168 (1940), as amended by 58 Stat. 746 (1944). The statute provided, in substance, for loss of United States nationality by departing from or remaining outside United States jurisdiction during a national emergency for the purpose of evading or avoiding military service.

After exhausting administrative remedies, appellant brought this action for declaratory relief. Appellant's

sole contention is that Sec. 401(j) is unconstitutional. This Court has twice held said section to be constitutional; on authority of *Gonzalez* v. *Landon*, 1954, 9 Cir., 215 F. 2d 955, *rev'd* on other grounds, 350 U.S. 920, and *Vidales* v. *Brownell*, 1954, 9 Cir., 217 F. 2d 136, the judgment of the District Court is affirmed.

(Endorsed:) Per Curiam Opinion. Filed Nov. 2, 1956.

PAUL P. O'BRIEN, *Clerk*.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,997

FRANCISCO MENDOZA-MARTINEZ, *Appellant*,

v.

ARGYLE R. MACKEY, Commissioner of Immigration and Naturalization and HERBERT BROWNELL, Attorney General of the United States, *Appellees*.

Judgment

Appeal from the United States District Court for the Southern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: November 2, 1956

PAUL P. O'BRIEN, *Clerk*.

No. ~~623~~ 54

In the Supreme Court of the United States

OCTOBER TERM, 1956

FRANCISCO MENDOZA-MARTINEZ, PETITIONER

v.

ARGYLE F. MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION AND HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 623

FRANCISCO MENDOZA-MARTINEZ, PETITIONER

v.

ARGYLE F. MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION AND HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The sole issue raised by the petition for a writ of certiorari is the constitutionality of Section 401 (j) of the Nationality Act of 1940, as amended, which provides for the expatriation of persons who depart from the United States in time of war for the purpose of evading service in the armed forces. As petitioner states, that issue of constitutionality is now before this Court for consideration in *Perez* v. *Brownell*, No. 572, in which the petition for a writ of certiorari was

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granted on November 13, 1956. 352 U. S. 908. The government therefore does not oppose the grant of certiorari in this case.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

DECEMBER 1956.